Attachment Four

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United States Senate
IMPEACHMENT TRIAL COMMITTEE
(ON THE ARTICLES AGAINST JUDGE ALCEE L. HASTINGS)
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IMPEACHMENT TRIAL COMMITTEE
EIGHTH ORDER

A. Prior Testimony

In its Fourth Order, dated May 24, 1989, the Committee noted the desirability, in circumstances consonant with fairness to the parties, of permitting the prior recorded testimony of some witnesses to be introduced into the record in place of live examinations. It is the Committee's belief that the use of this procedure, especially where the testimony related to facts not in substantial dispute or came from witnesses whose credibility is not questioned, will further the creation of a coherent record for use by the Senate.

The parties were directed to, and did, identify for the Committee the prior testimony they desired to offer into evidence. The Committee has reviewed all written submissions of the parties on this topic, and has considered their oral arguments as well. The Committee recognizes the general objection on the grounds of hearsay made by Judge Hastings to the receipt of any prior testimony as substantive evidence (somewhat modified in his most recent submission), but as noted in the Committee's disposition of pretrial issues on April 14, 1989, neither it nor the Senate is bound in these proceedings to strict judicial rules of evidence. (The

Committee notes that even under the Federal Rules of Evidence, hearsay may be received if the court is satisfied that the interests of justice are served by its admission.[1/] On the other hand, the Committee does not believe it appropriate to admit prior testimony into evidence on key points where credibility, context or interpretation are in dispute -- particularly where the opposing party has not had an opportunity for cross-examination.

The Committee also does not believe it appropriate to address at this time objections, such as relevance, competence, prejudice, privilege or hearsay, to the content of any proffered prior testimony, and expressly reserves all such decisions until the commencement of the evidentiary proceedings on July 10.

Subject to the foregoing, the Committee has decided that it will receive certain prior testimony as substantive evidence, but will do so only where the prior testimony is offered in place of -- and not in addition to -- a party's calling that witness in its own case. The Committee's decision to receive prior testimony from certain witnesses does not preclude those witnesses being called by the opposing party, with appropriate opportunity then for cross-

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1/ Rule 803(24), F.R.Ev.; see also, Rule 804(b)(5), F.R.Ev.

examination. Accordingly, the Committee rules that:

1. The entire testimony of Richard Lowe, Willie James Washington, and Laverne Boone before the Investigating Committee of the Eleventh Circuit ("IC") will be received into evidence. Judge Hastings has waived any specific objection to the testimony of these airline employee witnesses, whose testimony is limited solely to the meaning of certain airline records. The Committee believes that their testimony is not subject to substantial dispute, and notes that if there are further matters that Judge Hastings wishes to elicit from these witnesses, the Senate will at his request issue subpoenas so that he may do so in the presentation of his own evidence.

2. Neither the prior grand jury nor the IC testimony of Daniel Simons will be received into evidence. Judge Hastings has never cross-examined Mr. Simons,[2/] and Simons' testimony, which directly describes Judge Hastings' actions in issuing a forfeiture order that the House alleges was central to the bribery scheme, is more than peripheral. The

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2/ The Committee notes the House's position that Judge Hastings had, but declined, the opportunity to cross-examine Mr. Simons before the IC, but is more guided by its reluctance to have the record here contain significant substantive evidence against Judge Hastings from this witness who was not subject to cross-examination on behalf of Judge Hastings. Notwithstanding this ruling, however, the Committee remains of a general view that a party's failure to exercise an opportunity to cross-examine may appropriately be considered a waiver of that opportunity.

House is invited to consider whether other means which would allow Judge Hastings an opportunity of cross-examination, such as a telephonic deposition, might be employed to provide the testimony of Mr. Simons.

3. The complete trial testimony of Madeline Petty in United States v. Hastings and pp. 220, ll. 5-6; 222, ll. 3-7; and 224, ll. 7-11 from her IC testimony will be received into evidence, subject to Judge Hastings' right to call her as his own witness. The Committee is substantially influenced by the facts that Judge Hastings did have an opportunity to cross-examine Ms. Petty at his trial; that the testimony regarding Ms. Petty's travel to Las Vegas with Mr. Borders is not disputed; and that the details in her IC testimony regarding her phone number and non-acquaintance with Dredge are not disputed.

4. The IC testimony of Neal Sonnett and Joel Hirschhorn will not be received into evidence. The Committee has reviewed the proffered testimony with care. In both instances, the Committee feels, the testimony involves matters where the context and interpretation of particular events may be significant, and where the Committee is reluctant to permit its record to be based on ex parte examinations. Particularly with respect to Mr. Hirschhorn, the Committee notes the repeated attorney-client privilege

issues which his testimony raised, and feels that in these proceedings it would be better to have such testimony as the House might desire from this witness offered directly by the witness in Judge Hastings' presence.

5. The IC testimony of Carolyn McIver, Andrew Chisolm, and Eleanor Golar-Williams which relates to whether Hemphill Pride could be reached at their telephones will be received into evidence, if these witnesses are not called to testify. The Committee notes that Judge Hastings has, in his Answer to Impeachment Articles X through XIII, admitted the substantial accuracy of this testimony, and sees no reason why these three witnesses should be required to appear as live witnesses on this issue unless Judge Hastings wishes to call them as a part of his case. To the extent that any other issue is sought to be proven from these witnesses, however, the Committee will not receive their IC testimony for that purpose.

6. The IC testimony of Louima Romano will not be received into evidence. Judge Hastings has never cross-examined this witness, and the Committee notes that much of her proffered testimony was vague, and became precise only in response to leading questions.

7. The trial testimony of Paul Rico, Benjamin Daniel Brown, Charles T. Duncan, Mildred Hastings, Shirley Pride,

Simon Stephen Selig III, and Dudley Williams in United States v. Hastings and United States v. Borders will not be received into evidence. These are witnesses whom the opposing party has expressed a desire to examine, and if evidence from them is to be a part of the case here, the opposing party should have an opportunity to cross-examine. To the extent that any of these witnesses are unavailable, the Committee is willing to reconsider its ruling under standards similar to those in Federal Rule of Evidence 804.

8. The entire trial testimony of I.J. Cunningham, Willie E. Gary, Lisa Goldstein, Barbara Katzen, Carolyn Lewis, Alvoyd Merritt, the Honorable James C. Paine, Herman C. Perry, Mildred Pride, Herbert O. Reid, Frank Romano, Shirley Ross, Paul Snead, Ralph Stevenson, Delano Stewart, and Barbara Whiting-Wright in United States v. Hastings and United States v. Borders will be received into evidence. This testimony has been proffered by Judge Hastings, and the House has not objected.

9. Judge Hastings' application to include in the record as substantive evidence the entire trial records of both United States v. Hastings, No. 81-596-CR-ETG (S.D. Fla. 1983) and United States v. Borders, No. 82-75-A (N.D. Ga. 1982) is denied. The Committee sees no reason to further expand the record here with volumes of transcripts and

hundreds of exhibits from two separate proceedings. The Committee has been, and continues to be, willing to accept specific proffered items of testimony and documentary evidence, but believes that acceptance of the full record of two other trials as substantive evidence would be more confusing than informative.

The Committee defers ruling on Judge Hastings' alternative proffer of the entire Hastings trial record not as substantive evidence, but rather to show that the 1981 bribery allegations and the false statement issues arising out of his defense of them were presented fully and fairly to the jury which acquitted him. Judge Hastings argues that this should be a key, if not dispositive, fact in the Senate trial; the House managers assert, to the contrary, that this evidence has no relevance whatever, and Judge Hastings should be convicted or acquitted based solely on the evidence adduced here.

The Committee does not believe it appropriate to decide an important issue of weight and relevancy for the Senate in the context of ruling on whether certain prior testimony may be received as substantive evidence. It may be that Judge Hastings' argument can properly be put to the full Senate for such weight as any Senator chooses to give it. At this time the Committee notes that a decision to include the

entire Hastings trial record in its "report of evidence" to the Senate may have the effect of commingling the evidence admissible generally with a very similar body of evidence admitted only for limited purposes. The Committee invites Judge Hastings to make an alternative suggestion of a mechanism for presenting his argument regarding the effect, if any, of his 1983 acquittal to the full Senate -- for example, through creation of a summary of witnesses and exhibits in the 1983 trial for entry into the record here -- without the potential for confusion that may be inherent in duplicating the entire prior trial record.

B. Documents

In its Fifth Order, dated June 8, 1989, the Committee directed the parties to exchange lists and copies of their intended exhibits and, by not later than June 27, 1989, to serve notice of any objection to the opposing party's exhibits on the basis of authenticity, genuineness or status as a business record. The Committee's order provided that, in the absence of a "reasoned and specific objection" from the opposing party, the offering party would not be required to prove authenticity, genuineness or status as a business record for any document so identified.

The House has complied with the Committee's order by providing a list and copies of exhibits in a timely fashion. Judge Hastings has not. Accordingly, the Committee rules that the House shall retain the right to object on any basis to documentary evidence offered by Judge Hastings, including objections based on a position that Judge Hastings' failure to supply his exhibit list in a timely fashion has caused unfair surprise.

Judge Hastings has, however, made specific objections to some of the proffered House exhibits: Nos. 1, 4, 10, 15, 23, 38b, 43b, 44b, 45b, 46b, 47b, 48b, 49b, 50b, 51b, 52b, 53b, 54b, 55b, 56b, 57b, 58b, 59b, 60b, 61b, 62b, 64b, 65b, 66, 67, 120, 123, 124, 128, 129, 139, 141, 145, 147, 175b, 185b, 186b, 187b, 190, 192, 193b, 194b, 201, 202, 203, 206, 207, 208 and 209. Accordingly, all other proffered House exhibits will be received as genuine, authentic, and where appropriate, as regularly recorded business entries.

With regard to Judge Hastings' specific objections to proffered House exhibits, the Committee rules as follows:

Exhibits 1, 15, 66, 67, 120, 123, 124, 128, 129, 139, 141, 145, 147, 192, 201, 202, 203, 206, 207, 208, and 209: Ruling reserved, subject to argument before the Committee.

Exhibits 4, 175b, 190: Exhibits will be accepted as genuine, authentic, and, where appropriate, as regularly recorded business entries.

Exhibits 10, 23: Exhibits accepted if legible.

Exhibits 38b, 43b, 44b, 45b, 46b, 47b, 48b, 49b, 50b, 51b, 52b, 53b, 54b, 55b, 56b, 57b, 58b, 59b, 60b, 61b, 62b, 64b, 65b, 185b, 186b, 187b, 193b, and 194b: Respondent objects to the admission of these transcripts of tape recorded conversations on the grounds that the transcripts are "inaccurate and incomplete" as well as on "other [unspecified] grounds." The Committee recognizes that the tapes themselves are the best evidence of the contents of recorded conversations, but believes that the transcripts tendered by the House are appropriately received as additional evidence.3/ Accordingly, these documents will be received. Leave is hereby given to Judge Hastings to submit any corrections he may wish made to the transcripts tendered by the House, and those corrections will be received as

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3/ Although not binding on the Committee or the Senate, this procedure is commonly followed in the courts. See e.g., Govt. of Virgin Islands v. Martinez, 847 F.2d 125, 128 (3d Cir. 1988); United States v. Rengifo, 789 F.2d 975, 980-83 (1st Cir. 1986), and cases cited therein.

separate Hastings exhibits.

C. Hearing Procedures

In order to provide for orderly proceedings, the parties are requested to alert the Committee to any legal issues or evidentiary matters that they anticipate may require ruling by the Committee and to submit short memoranda in support of their position. The parties should attempt to so advise the Committee at least three days in advance of when the need for a ruling is anticipated.

Judge Hastings is directed promptly to advise the House and the Committee of the order in which he anticipates that his witnesses will be called.

Jeff Bingaman, Chairman

Arlen Specter, Vice Chairman

Dated: July 10, 1989